Supreme Court of the United States

October Term

No. 317

LEO P. McKEE, as Trustee for
INDUSTRIAL FINANCE CORP., et al,
Petitioner,

vs.

GREAT AMERICAN INSURANCE COMPANY,
Respondent.

LEO P. McKEE, as Trustee for
INDUSTRIAL FINANCE CORP., et al,
Petitioner,

vs.

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA,
Respondent.

Brief of Great American Insurance Company in opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PREFACE

This respondent is concerned only with Case No. 19,940 as it appeared in the United States Court of Appeals for the Fifth Circuit.

THE QUESTIONS PRESENTED FOR REVIEW

As authorized by Rule 40, respondent restates the questions set forth by the petitioner, as follows:

I. UNDER THE LAW OF FLORIDA CAN A CORPORATION CLAIM THAT IT HAS NO KNOWLEDGE OF THE ACTIVITIES OF ITS SOLE STOCKHOLDER, PRESIDENT, AND DRIVING FORCE WHEN IT SUBSEQUENTLY SEEKS TO RECOVER FOR THE DEFALCATIONS OF THAT VERY INDIVIDUAL?

II. IN AN ACTION ON A COMMERCIAL BLANKET BOND DOES A TRUSTEE IN BANKRUPTCY FOR A CORPORATION STAND IN THE SAME SHOES AS THE INSURED WHEN THE BOND SPECIFICALLY STATES THAT THE INSURED IS "ROBERT A. McKEE d/b/a INDUSTRIAL FINANCE CORPORATION AND COMMERCIAL CAPITOL CORPORATION"?

III. WHEN THE TESTIMONY IS UNCONTROVERTED BEFORE THE DISTRICT COURT IN A HEARING ON A MOTION FOR SUMMARY JUDGMENT THAT THE SOLE STOCKHOLDER WANTED A FIDELITY BOND TO PROTECT HIMSELF AND HIS COMPANY AGAINST FIDELITY LOSSES OCCASIONED BY EMPLOYEES (R. 35), WAS THE DISTRICT COURT CORRECT IN ENTERING A SUMMARY JUDG-

MENT FOR THE INSURER WHEN THE SOLE STOCKHOLDER WAS THE DEFALCATOR?

STATEMENT OF THE CASE

Respondent would augment the statement of the case and the facts presented by the petitioner.

Following the entry of summary judgment in favor of respondent, petitioner appealed to the Court of Appeals for the Fifth Circuit which affirmed the judgment with a per curiam-one paragraph opinion. 316 F.2d 473.

Certain facts should also be included for a more thorough understanding of the decisions by the lower courts, as follows:

On January 28, 1960, respondent executed a bond in the principal amount of $100,000.00 (R. 21-23) with the insured designated as "Robert A. McKee d b a Industrial Finance Corporation and Commercial Capitol Corporation". According to the allegations of the appellant's complaint, Robert A. McKee was the sole stockholder of Commercial Capitol Corporation from April 24, 1959, until the stock of Commercial was transferred by McKee to Industrial Finance Corporation on May 12, 1961. R. 3. According to petitioner's complaint, Robert A. McKee was the sole stockholder of Industrial from October 6, 1959, to January 20, 1961. R. 4.

The only testimony before the court was that of Wade H. Everhart, Jr. (R. 26-51). In his deposition Everhart related that McKee came to him to obtain a bond pro-

tecting himself against fidelity defalcations by his employees. R. 35. Everhart further testified that since McKee was the sole owner of all the stock that the obligee on the bond was written to protect his [McKee's] interest and therefore the bond was written as it was. R. 42. No testimony was presented or affidavits filed to contravert this.

In his complaint trustee alleges that Commercial Capitol Corporation was insolvent from April 24, 1959, to the present and that Industrial Finance Corporation was insolvent from October 6, 1959, to the present. R. 4, 5.

ARGUMENT

In addition to the fact that petitioner has not brought himself within the considerations governing review on certiorari, as set forth in Rule 19, the decision of the District Court and of the Court of Appeals would have to be sustained, and certiorari denied, on the simple statement of the crux of this case: when a fidelity bond is secured by an individual, doing business as two corporations, and when those corporations are wholly-owned by that individual, and the purpose is to protect himself, is the surety liable under the terms of the bond for the defalcations of that individual?

The answer is clearly no and one that correctly calls for the entry of a summary judgment for the respondent insurance company by the District Court and an affirmance of that judgment by the Court of Appeal, as was done here.

Nevertheless, respondent will discuss the several

contentions of the petitioner to show that a writ of certiorari should not be issued in the instant case.

Relying on **Riley v. Fatt**, 47 So.2d 769 (Fla. 1950), petitioner claims armored protection in the form of the corporate veil, but it is in the petitioner's own complaint we find that Commercial Capitol Corporation was insolvent from April 24, 1959, (R. 4) and Industrial Finance Corporation was insolvent from October 6, 1959, (R. 5) and that Robert A. McKee, the named insured on the bond in the instant case, was the "sole stockholder and dominant factor in its operation" (R. 5) and was such at the time the bond was executed by Robert A. McKee and the respondent on January 28, 1960. Under these facts **Riley v. Fatt** offers little solace to the petitioner, as it is a typical case of a judgment creditor attempting to levy on the personal belongings of sole stockholders as a result of supplementary proceedings in aid of execution. The court in **Riley** also indicated that there was no indication that the corporation was organized for the purpose of evading personal responsibility otherwise than in a proper manner; the corporations in the instant case were insolvent by reason of their sole stockholder's defalcations at the time he executed the bond in question. It should be pointed out that this would be another basis whereby the Court of Appeal could have affirmed the judgment for the respondent because the bond would be void in its inception as a result of the obligee's dishonesty. See Section 12 of the bond. R. 23.

Petitioner has cited cases from the Fifth Circuit Court of Appeal, which he contends would enable the trustee in bankruptcy to be able to recover on a bond when the insured under the bond would not be able to do

so. Petitioner specifically cites **Franklin Savings & Loan Co. v. American Employers Ins. Co.**, 99 F.2d 494 (5th Cir. 1938), and yet that particular case turns on the fact that the Savings & Loan was the obligee under the fidelity bond for any loss which a particular executive officer might cause through certain described acts. The crux of the decision was whether any of the described acts were committed by the managing officer and it was held that he had been guilty of wilful misapplication and acts of fraud. There is another obvious distinguishing characteristic: the corporation was the obligee and protected under the bond from the acts of a certain named employee.

In addition to the fact that the **Franklin Savings & Loan Co. v. American Employers Ins. Co.** case supports the decision complained of, there would be no basis for granting a petition for certiorari here even if there were internal conflicts within the decisions of the Fifth Circuit. **Wisniewski v. United States**, 353 U.S. 901, 902 (1957).

Petitioner also seeks to create a conflict with decisions of the Fourth Circuit Court of Appeals, citing **Levey v. Jamison**, 82 F.2d 958 (4th Cir. 1936), in an effort to show the trustee can maintain suit upon a fidelity bond. The holding of the Fourth Circuit supports the decision in the instant case because that court held:

> "It is manifest that if the jury should find that the corporation itself was a party to the acts complained of, there can be no recovery in this case. The parties to the bond did not mean insure the corporation against losses which might be caused by its own dishonesty or crime, but

merely to protect it against the dishonesty or crime of its employees. A policy of fidelity insurance does not insure an employer against his own fraud." (Citing cases from several jurisdictions). Id. at 960.

A situation similar to the instant case has been resolved by that same Fourth Circuit Court of Appeals in **Fidelity & Casualty Co. v. Hoyle**, 64 F.2d 413 (4th Cir. 1933), in which the trustee in bankruptcy sued to recover under a similar bond. The bankrupt had been clerk of the Superior Court of Guilford County, North Carolina, for some years and the bond was executed by his son, who was a deputy clerk under the bankrupt. The bankrupt was the named obligee on the bond and the evidence revealed that the obligee was thoroughly acquainted with what was going on and that most, if not all, of the improper withdrawals of funds by his son were made under the obligee's direction.

In reversing a judgment for the trustee, the Court, speaking through Judge John J. Parker, held:

> "It needs neither argument nor citation of authority to sustain the proposition that M. W. Gant, Sr., would not be allowed to recover on the bond. Not only did he not give the notice which the bond required, but he was a party to the acts complained of and is precluded from recovery by the salutary rule that the law will not allow one to profit by his own wrong. His trustees in bankruptcy, as such, have no greater rights. Zartman, Trustee, v. First National Bank 216 U.S. 134, 30 S.Ct. 368, 54 L.Ed. 418; Remington on Bankruptcy, vol. 4, Section 1409.

Finally, the petitioner complains of the entry of summary judgment in favor of the respondent and yet describes the bond as being "issued with the curious nomenclature for the obligee, 'Robert A. McKee, d b a Industrial Finance Corporation and Commercial Capitol Corporation.'" Page 6 of petitioner's brief. Petitioner also contends in his argument that in the instant case "the court below relied solely on the nomenclature of the bond. . . ." Page 9 of petitioner's brief. It can be readily seen that the instant decision turns on its own unique facts. When decisions turn solely upon an analysis of particular facts or upon construction of a particular contract, this court should not issue a writ of certiorari. **United States v. Johnston**, 268 U.S. 220, 227 (1925); Cf. **Gravey Tank & Mfg. Co. v. Linde Air Products**, 336 U.S. 271, 275 (1949), adhered to on rehearing, 339 U.S. 605.

This is a case which turns on its own peculiar facts and the construction of the bond. It has been correctly decided by both the District Court and the Court of Appeal. It falls precisely within that example of when a petition for writ of certiorari should not be granted as given by Chief Justice Taft in **Layne & Bowler Corp. v. Western Well Works**, 261 U.S. 387 (1923), quoted approvingly in **Rice v. Sioux City Cemetery**, 349 U.S. 70, 79 (1954), as follows:

> ". . . [i]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of ap-

peal. The present case certainly comes under neither head." Id. at 393.

CONCLUSION

Because of petitioner's failure to show that the per curiam decision of affirmance of the Circuit Court of Appeal conflicts with a decision of another Court of Appeal or has been decided in conflict with applicable state law or has decided an important Federal question which should be decided by this court and because this particular decision turns on its own unique facts and the construction of a particular contract, this court should deny the petition for a writ of certiorari.

Respectfully submitted,

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